

Drowning in the Wake of *Concepcion*: How to Protect Small Claims Plaintiffs Bound by Mandatory Arbitration Agreements

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I. INTRODUCTION

We live in an age in which standard form contracts written by big businesses are a common feature of our commercial relationships. Wireless phone companies, cable providers, and a burgeoning array of consumer product companies routinely impose binding pre-dispute arbitration agreements on consumers, whereby consumers are required to arbitrate, rather than litigate, future disputes. Moreover, an ever-increasing number of consumer arbitration agreements contain a provision providing that consumers, by accepting the agreement, waive the right to arbitrate on a class basis. This trend has proven particularly problematic for consumers with monetarily small claims. As both courts and commentators have recognized, many small-dollar claims are simply not economically feasible to pursue on an individual basis.¹ Thus, barring consumers from pursuing a claim as a class has the potential to leave millions of consumers without a remedy for corporate wrongdoing.

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¹ See, e.g., *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 197–98 (2d Cir. 2011) (“[T]he cost of plaintiffs’ individually arbitrating their dispute [with the company] would be prohibitive”); see also J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1737 (2006) (explaining that a consumer claim is typically a “negative-value claim[],” meaning that the total costs of pursuing the claim exceed the total expected recovery for that claim).

Until recently, courts were split as to whether class arbitration waivers are enforceable.² However, on April 27, 2011, the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* upheld the ability of companies to use arbitration clauses to exempt themselves from class actions.³ While the precise impact of *Concepcion* is yet to be determined, the Court's holding makes it clear that companies can avoid not only actions in court but also classwide arbitration proceedings through the simple expedient of incorporating a class arbitration waiver within the scope of an arbitration provision.⁴ As recognized by Justice Stephen Breyer in his dissenting opinion in *Concepcion*, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."⁵

Accordingly, in the post-*Concepcion* landscape, the most pressing issue in consumer arbitration reform is how to provide a viable forum for consumers with low-value claims to seek redress. This Note examines the need for consumer protection in arbitral proceedings in the wake of *Concepcion* and proposes amending the Consumer Due Process Protocol (Consumer Protocol) to remedy consumer injury and to deter corporate misconduct.

II. *AT&T v. CONCEPCION*: THE DEATH KNELL OF CLASS ARBITRATION?

Concepcion, a 5–4 decision by the U.S. Supreme Court, dramatically reconfigured the law of class arbitration waivers and the manner in which businesses will contract with consumers. In what has been deemed a “devastating blow to consumer rights,”⁶ the Court's ruling suggests that companies can and now will insulate themselves from facing meaningful accountability by including class arbitration waiver language in their boilerplate contracts with consumers. Without reform, *Concepcion* will shield companies against liability by eliminating the ability of many consumers to pursue legitimate, albeit small, claims.

² Compare *Anderson v. Comcast, Corp.*, 500 F.3d 66, 72 (1st Cir. 2007) (upholding class arbitration waiver and noting federal policy favoring arbitration), and *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374–75 (3d Cir. 2000) (enforcing class arbitration waiver), with *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (holding class arbitration waiver unenforceable).

³ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1740 (2011).

⁴ See Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights/> (“[T]he real game-changer for class action litigation [is *Concepcion*], as it permits most of the companies that touch consumers’ day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.”).

⁵ *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting) (citing *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

⁶ Editorial, *Gutting Class Action: The Five Conservatives of the Supreme Court Chose Corporations Over Everyone Else*, N.Y. TIMES, May 13, 2011, at A26.

The underlying dispute in *Concepcion* involved a cellular phone contract between Vincent and Liza Concepcion and AT&T Mobility (AT&T).⁷ Lured by the promise of “free” cell phones, the Concepcions purchased a two-year service contract from AT&T.⁸ After learning that they had to pay \$30.22 in sales taxes for the devices, the Concepcions initiated a class action lawsuit, alleging that AT&T had engaged in false advertising and fraud by charging sales tax on “free” phones.⁹ In response, AT&T moved to compel arbitration under the pre-dispute arbitration clause in its service agreement which, *inter alia*, prohibited consumers from bringing class arbitrations, requiring consumers instead to arbitrate claims individually.¹⁰

Both the district court and the Ninth Circuit found the class arbitration waiver at issue unenforceable under state law. The district court noted that the provisions in the arbitration agreement were an “adequate substitute” for consumers seeking class action,¹¹ but nonetheless, concluded the class waiver was unconscionable and therefore invalid pursuant to California’s *Discover Bank* rule.¹² On appeal, the Ninth Circuit affirmed the ruling, also finding the class arbitration waiver unconscionable under California’s *Discover Bank* rule.¹³

The Supreme Court then granted certiorari to determine whether the Federal Arbitration Act (FAA) “prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”¹⁴ Writing for the majority, Justice Antonin Scalia clarified the preemptive reach of the FAA and continued the Court’s longstanding trend of enforcing arbitration agreements.¹⁵

⁷ *Concepcion*, 131 S. Ct. at 1744.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 1744–45. The arbitration provision read as follows: “You and AT&T agree that each may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” Brief for Respondents at 3, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2012 WL 441292 at *3.

¹¹ *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *12 (S.D. Cal. Aug. 11, 2008).

¹² *Id.* at *14. The *Discover Bank* rule classifies as unconscionable class arbitration waivers contained in consumer contracts of adhesion that would exempt companies from accountability for “cheat[ing] large numbers of consumers out of individually small sums of money.” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

¹³ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009). The court also held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.” *Id.* at 857.

¹⁴ *Concepcion*, 131 S. Ct. at 1744.

¹⁵ *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (“To give effect to [its] purpose, the FAA compels judicial enforcement of a wide range of written arbitration agreements.”); *see also* Richard A. Nagareda, *The Litigation-Arbitration*

The FAA¹⁶ was enacted in 1925 as a direct response to the reluctance of state courts to enforce commercial arbitration agreements.¹⁷ Over the last several decades, the Court has interpreted the FAA broadly, stating the general policy that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”¹⁸ Consistent with this pervasive federal scheme and trend favoring the enforcement of arbitration provisions, the Court in *Concepcion* upheld the validity of class arbitration waivers, ruling that the FAA’s liberal policy favoring arbitration preempted California’s *Discover Bank* rule that made class arbitration waivers unenforceable in many consumer contracts.¹⁹

In reaching its decision, the majority explained that class arbitration sacrifices the informality, speed, and low cost of arbitration, while also greatly increasing the risks to defendants who may be forced to settle questionable claims.²⁰ According to Justice Scalia, although California’s *Discover Bank* rule “does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.”²¹ While acknowledging the dissent’s claim that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” Justice Scalia concluded, “States cannot require a procedure that is inconsistent with the FAA.”²²

With *Concepcion* in the rearview mirror, the decision’s predictable effects are now taking form. When the ruling was first issued, one commentator deemed the decision a “game-changer” and “one of the most important and favorable cases for businesses in a very long time.”²³ Today, more than one year later, companies are routinely implementing class arbitration waivers and courts are frequently citing *Concepcion* as the reason for dismissing consumer class action claims.²⁴ Thus, without reform, millions of consumers will continue to remain without access to justice for corporate wrongdoing.

To understand the harsh and inequitable consequences of class arbitration waivers, consider the facts of *Concepcion*. By including a term in its contract

Dichotomy Meets the Class Action, 86 NOTRE DAME L. REV. 1069, 1092 (2011) (“[T]he modern Court has never yet met an arbitration clause that it didn’t like.”).

¹⁶ 9 U.S.C. §§ 1–16 (2006).

¹⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (asserting that the purpose of the FAA was to reverse the “longstanding judicial hostility to arbitration agreements”).

¹⁸ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

¹⁹ *Concepcion*, 131 S. Ct. at 1753.

²⁰ *Id.* at 1751–52.

²¹ *Id.* at 1750.

²² *Id.* at 1753.

²³ Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, N.Y. TIMES, Apr. 28, 2011, at B3 (citing law professor Brian T. Fitzpatrick).

²⁴ PUBLIC CITIZEN & NAT’L ASS’N OF CONSUMER ADVOCATES, JUSTICE DENIED—ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT’S *CONCEPCION* DECISION ARE PLAINLY EVIDENT 6 (2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

prohibiting consumers from going to court and instead requiring one-on-one arbitration, AT&T precluded consumers from pursuing a claim as a class. Only the few consumers willing to incur the costs of bringing an individual claim would have any chance at a recovery. Is a consumer likely to bring a \$30 claim? No. Under the current rules of arbitration, a consumer is required to pay a filing fee of up to \$125 for any claim under \$10,000, while the business is required to pay all additional costs.²⁵ To make matters worse, even if a consumer prevails in arbitration, AT&T can continue its deceptive scheme of charging consumers sales tax on phones that are advertised as free.

As this example demonstrates, by including a class arbitration waiver in its arbitration agreement with consumers, a company is essentially handed a get-out-of-jail-free card for deceptive and potentially fraudulent business schemes, while consumers are effectively precluded from vindicating their claims. Thus, reform is needed to incentivize consumers to bring claims on an individual basis and to deter companies from future misconduct.

III. A PATH TO REFORM: THE CONSUMER PROTOCOL

While some commentators contend that the class mechanism is the only viable solution to provide consumers with incentive to assert low-value claims,²⁶ this Note suggests that a better alternative is to ensure that arbitration agreements contain sufficient procedural safeguards to guarantee a fair process for all parties. As the majority in *Concepcion* noted, by permitting class arbitration, with its attendant discovery, class certification, and class settlement formalities, the parties essentially forgo the advantages of arbitration.²⁷ Justice Grodin of the California Supreme Court has explained that class arbitration “must be evaluated, not in relation to some ideal but in relation to its alternatives.”²⁸ Given the Consumer Protocol’s widespread influence on arbitration, amending the Consumer Protocol is an effective alternative that would ensure all consumers are subject to fair arbitration agreements.

²⁵ See AM. ARBITRATION ASS’N, CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES (2005), available at <http://www.foreclosuremediationfl.adr.org/sp.asp?id=22014> [hereinafter SUPPLEMENTARY PROCEDURES].

²⁶ See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 12 (2000) (contending that the ability to aggregate claims is crucial to protect the rights of those individuals “who lack the resources to litigate individual claims”).

²⁷ *Concepcion*, 131 S. Ct. at 1750–52.

²⁸ *Keating v. Superior Court of Alameda Cnty.*, 645 P.2d 1192, 1209 (Cal. 1982).

A. Background and Influence of the Consumer Protocol

In response to concerns regarding fairness in arbitration, the National Consumer Disputes Advisory Committee²⁹ crafted the Consumer Protocol—a set of standards and procedures designed to ensure a fair arbitration process.³⁰ The Consumer Protocol sets forth fifteen principles to serve as minimum safeguards for inclusion in all consumer arbitration agreements, including: informed consent, convenient hearing locations, and reasonable costs.³¹ Although it does not have the force of law,³² the Consumer Protocol has experienced widespread influence in three ways: it has (1) been adopted by the major arbitral service providers, (2) served as a guide to businesses drafting consumer arbitration agreements, and (3) created a benchmark for courts to use in deciding whether to enforce particular consumer arbitration agreements.

One of the most, if not the most, significant impacts of the Consumer Protocol on individual consumers was the adoption of its standards and principles by the major arbitration service providers.³³ The largest arbitration providers, as well as many independent arbitration service providers, have endorsed the Consumer Protocol, incorporated its principles into their own arbitration rules, and agreed to administer consumer arbitrations only when the

²⁹The National Consumer Disputes Advisory Committee was convened to “advise the American Arbitration Association in the development of standards and procedures for the equitable resolution of consumer disputes.” *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy, H. Comm. on Oversight and Government Reform*, 111th Cong. 2 (2009) (statement of Richard W. Naimark, Senior Vice President, Int’l Ctr. for Dispute Resolution, Am. Arbitration Ass’n). This Committee was comprised of representatives from a wide array of consumer groups, providers of goods and services, government agencies, and academic institutions. *See id.* In addition to its advisory role, the Committee hoped that the standards it proposed would have a broader effect, including influencing judicial opinions regarding the “enforceability of arbitration agreements.” *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 406 (2004).

³⁰The Consumer Protocol’s provisions are designed to provide a “fundamentally-fair ADR process,” by assuring the inclusion of certain due process protections. *See* NAT’L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL Principle 1 (1998) [hereinafter CONSUMER PROTOCOL].

³¹*See id.* at Table of Contents.

³²The Consumer Protocol is a self-regulating mechanism that arbitration providers voluntarily agree to follow. Harding, *supra* note 29, at 370–71. Harding asserts, however, that even voluntary protocols have significant influence. *Id.* at 452. Voluntary compliance with the Consumer Protocol is due in part to the “desire of arbitration providers to assure the fundamental integrity of the process provided by their organizations.” Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 222 (2006).

³³*See* Harding, *supra* note 29, at 407. The American Arbitration Association (AAA), the largest arbitration service provider, adopted the Consumer Protocol as “the essential guidepost for the Association’s participation in consumer ADR programs.” *Id.* (citing Thomas J. Stipanowich, *Resolving Consumer Disputes*, DISP. RESOL. J., Aug. 1998, at 13). In turn, other major arbitration service providers have also adopted consumer due process standards. *Id.*

arbitration agreements comply with the Consumer Protocol.³⁴ The impact of these providers adhering to the Consumer Protocol is substantial, given that “the vast majority of arbitrations conducted both domestically and internationally are ‘sponsored’ in some way by ‘provider’ organizations.”³⁵ Generally, consumer arbitration agreements designate one of these provider organizations as the entity that will administer arbitration services in connection with a dispute.³⁶ Accordingly, the adoption and enforcement of the Consumer Protocol by the arbitration providers protects consumers from inequitable arbitration agreements because these arbitration providers refuse to provide arbitration services if a company’s arbitration agreement does not comport with the Consumer Protocol.

While some commentators criticize the Consumer Protocol for lacking a mechanism to ensure compliance with its provisions,³⁷ recent research demonstrates that private enforcement by the service providers effectively regulates the fairness of consumer arbitration clauses. For instance, a study by the Searle Civil Justice Institute found that a substantial majority of consumer arbitration agreements comply with the Consumer Protocol.³⁸ Moreover, the data showed that service providers are effective at identifying and refusing to

³⁴ See *id.* (citing the AAA, National Arbitration Forum, and JAMS as major arbitration providers that have adopted consumer due process standards in response to the Consumer Protocol). Where a company’s arbitration agreement does not meet the due process standards set forth in the Consumer Protocol, these providers will refuse to arbitrate disputes arising between the business and the consumer. See, e.g., AM. ARBITRATION ASS’N, AAA REVIEW OF CONSUMER CLAUSES, *available at* <http://www.foreclosuremediationfl.adr.org/si.asp?id=4453> (last visited July 28, 2012) (stating the AAA policy of refusing to administer arbitration proceedings pursuant to consumer clauses that do not “substantially and materially” comply with the Consumer Protocol).

³⁵ Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What’s Happening and What’s Not*, 56 U. MIAMI L. REV. 949, 965 (2002).

³⁶ For example, AT&T’s arbitration agreement identifies the AAA as the arbitration service provider that will administer its disputes and read as follows: “AT&T and you agree to arbitrate all disputes and claims between us. . . . The arbitration will be . . . administered by the AAA.” 2.2 *Arbitration Agreement*, AT&T Wireless Customer Agreement, *available at* <http://www.att.com/shop/legalterms.html?toskey=wirelessCustomerAgreement> (last visited Aug. 23, 2012).

³⁷ See, e.g., Jean R. Sternlight, *Consumer Arbitration*, in ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 174 (Edward Brunet et al. eds., 2006) (“Because the protocols are simply policies adopted by arbitration providers, there is no clear enforcement mechanism.”).

³⁸ See generally SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT (2009), *available at* <https://www.aryme.com/docs/adr/2-2-1235/informe-sealy-aaa-eeuu-2009-us-sealy-report-aaa.pdf>. This study found that 76.6% of arbitration agreements fully complied with the Consumer Protocol and 98.2% of arbitration agreements either complied with the Consumer Protocol or were properly identified and responded to by the AAA for non-compliance. *Id.* at 110.

administer clauses that do not adhere to the Consumer Protocol.³⁹ Given the widespread adoption of the Consumer Protocol by arbitration providers and the proven effectiveness of private regulation, amending the Consumer Protocol would effectively protect small claims plaintiffs in the aftermath of *Concepcion*.

In addition to having a significant impact on arbitration through its adoption by the major arbitration service providers, the Consumer Protocol also provides guidance to businesses drafting consumer arbitration agreements. Recent empirical research supports the supposition that companies do, in fact, use the Consumer Protocol as a guide when drafting arbitration agreements. Specifically, one study found that in response to a compliance review by the American Arbitration Association (AAA) more than 150 businesses either waived or revised problematic provisions in arbitration agreements.⁴⁰ Moreover, some attorneys advise business clients to draft consumer arbitration agreements in accordance with the Consumer Protocol.⁴¹ Thus, as lower courts struggle toward a consensus of the procedures required for arbitral fairness in the wake of *Concepcion*, an amended Consumer Protocol would provide companies with a baseline set of rules to follow when drafting pre-dispute arbitration agreements.

Finally, the Consumer Protocol's impact is seen in the courtroom, where courts widely cite the Consumer Protocol when determining the enforceability of a particular arbitration agreement.⁴² For instance, in *Green Tree Financial Corp.-Alabama v. Randolph*, Justice Ginsburg noted the effectiveness of the Consumer Protocol as a guide to industry standards.⁴³ There, the arbitration agreement at issue was silent as to the "rules under which arbitration [would] proceed or the costs a consumer [was] likely to incur in arbitration."⁴⁴ Justice Ginsburg explained that the drafter of the contract could have provided fair cost-allocation rules "by specifying . . . that arbitration would be governed by the rules of the American Arbitration Association (AAA)."⁴⁵ In a footnote, Justice Ginsburg included sample arbitration providers that have developed

³⁹ See *id.* at 110–11 (noting that the AAA refused to administer 9.4% of consumer cases when the business did not to comply with the Consumer Protocol).

⁴⁰ *Id.* at 96.

⁴¹ See Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, in CONSUMER FINANCIAL SERVICES INSTITUTE 493, 508 (Practicing Law Institute Corporate Law and Practice Course Handbook Series No. 23609, 2010) (advising business clients to draft fair arbitration clauses that comply with consumer due process protocols). In fact, Kaplinsky has explained that it is in a company's best interest to draft a fair arbitration agreement that complies with the Consumer Protocol. See Alan S. Kaplinsky & Mark J. Levin, *The Impact of Concepcion on Consumer Financial Services Arbitration Agreements and the Future of Consumer Litigation*, CONSUMER FIN. SERV. LAW REPORT, May 25, 2011, at 4 (noting that consumer-friendly arbitration provisions promote customer goodwill and that courts look more favorably upon such agreements).

⁴² See Harding, *supra* note 29, at 370.

⁴³ 531 U.S. 79, 94–95 (2000) (Ginsburg, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Id.* at 95.

fairness principles, specifically listing the Consumer Protocol as a model “for fair cost and fee allocation.”⁴⁶ As this case demonstrates, the Consumer Protocol serves two functions for the courts: it informs the courts when articulating their own standards of due process necessary for enforcement of an arbitration agreement and provides a model from which to judge specific arbitration agreements.

B. *Need for Amendment to the Consumer Protocol*

While the Consumer Protocol requires minimum standards of fairness and provides arbitration to consumers at a relatively low dollar amount,⁴⁷ the problem is that the Consumer Protocol provides no incentive for individual consumers to bring a recovery action when the claim is monetarily small.

As originally drafted, the Consumer Protocol states that “a fundamental principle of our civil justice system is that a person should never be denied access to a court due to an inability to pay court costs.”⁴⁸ Accordingly, Principle 6 of the Consumer Protocol reads as follows: “Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay.”⁴⁹ However, the Consumer Protocol was drafted in the early years of consumer arbitration before the drafters could anticipate the major issue facing courts today: how to remedy consumers with small claims in the wake of *Concepcion*.⁵⁰ As this Note has demonstrated, many consumers are now required to bring low-value claims on an individual basis, thus making arbitration prohibitively expensive for some consumers under the current standards of the Consumer Protocol.

Therefore, even with the Consumer Protocol, consumer arbitration reform is necessary to ensure that consumers are “never . . . denied access to a court due to an inability to pay.”⁵¹

⁴⁶ *Id.* at 95 n.2.

⁴⁷ A recent study by the Searle Civil Justice Institute, which examined in detail consumer arbitration cases administered by the AAA, found that “[i]n cases with claims seeking less than \$10,000, consumer claimants paid an average of \$96 (\$1 administrative fees + \$95 arbitrator fees).” SEARLE CIVIL JUSTICE INST., *supra* note 38, at xiii.

⁴⁸ CONSUMER PROTOCOL, *supra* note 30, at Principle 6, Reporter’s Comments.

⁴⁹ CONSUMER PROTOCOL, *supra* note 30, at Principle 6.

⁵⁰ In an article calling for the reform of consumer arbitration and proposing a codification of the Consumer Protocol, Professor Amy Schmitz notes that the Consumer Protocol did not address the issue of class relief. See Amy Schmitz, *Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness* 28 (Univ. of Colo. Law Sch. Legal Studies Research Paper Series, Working Paper No. 10-02, 2010).

⁵¹ CONSUMER PROTOCOL, *supra* note 30, at Principle 6, Reporter’s Comments.

IV. PROPOSED REVISION TO THE CONSUMER PROTOCOL

Given the concerns that class arbitration waivers pose for consumers, this Note proposes an amendment to the Consumer Protocol that would both incentivize consumers to bring claims on an individual basis and deter corporate misconduct.

The current text of Section C-8 of the Supplementary Procedures reads as follows:

Fees and Deposits to be Paid by the Consumer: If the consumer's claim or counterclaim does not exceed \$10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of \$125.⁵²

The proposed amendment would provide an additional subsection relating directly to small claims and would read⁵³:

- (a) Claims seeking \$10,000 or less.
 - (i) Providers of goods and services shall reimburse a Consumer for payment of the filing fee for all non-frivolous claims.
 - (ii) Providers of goods and services shall reimburse a prevailing Consumer the amount of reasonable attorneys' fees and any expenses reasonably accrued for investigating, preparing, and pursuing the claim.
 - (iii) The Consumer may choose whether the arbitration proceeds in person, by telephone, or based only on written submissions.
 - (iv) In the event that an arbitrator issues an award in the Consumer's favor that is greater than the Provider's last written settlement offer prior to arbitration, the Provider will pay the Consumer an amount equal to the value of the maximum claim that may be brought in small claims court in the county of the Consumer's billing address or the arbitral award, whichever is greater.
 - (v) In the event that an arbitrator awards the Consumer more than the Provider's last settlement offer, then the Provider will pay the Consumer's attorney twice the amount of attorneys' fees.
 - (vi) Consumers and their attorneys are not required to keep the results of the arbitration confidential.

Although the class action certainly serves a significant purpose, a system that provides sufficient procedural safeguards has "the potential to serve many

⁵² See SUPPLEMENTARY PROCEDURES, *supra* note 30; see also CONSUMER ARBITRATION POLICY: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS, JAMS: THE RESOLUTION EXPERTS 3 (2009), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf (stating that when a consumer initiates arbitration against a company, the consumer must pay only \$250, and when a corporation initiates the arbitration, the company must pay all arbitration fees).

⁵³ This proposed text is modeled after the consumer-friendly provisions included in AT&T's arbitration agreement at issue in *Concepcion*.

of the same public interests served by class actions.”⁵⁴ Amending the Consumer Protocol would retain the goals of arbitration, while also providing access to justice for those consumers who could otherwise pursue claims only in a class proceeding.

A. Incentivizing Consumers with Small Claims

In the wake of *Concepcion*, the provisions of this amendment would adequately replace the class vehicle by guaranteeing substantial, cost-effective recovery in two ways: (1) by providing the opportunity for a considerable recovery when a company who forces a consumer into arbitration refuses to settle, and (2) by creating substantial incentives for the company to settle with a consumer in order to avoid the possibility of having to pay a substantial premium. By requiring companies to include a number of consumer-friendly provisions in binding pre-dispute arbitration agreements, the Consumer Protocol would incentivize both consumers and attorneys to vindicate otherwise uneconomic claims.⁵⁵

First, the amendment would resolve the “negative-value claim” problem by providing arbitration to low-value claimants at no cost, provided the claim is not deemed frivolous.⁵⁶ Under the current rules provided by the AAA, consumers are responsible for paying some filings fees and sometimes a portion of the arbitrator’s fees. However, requiring a company to pay all costs of arbitration when the claim is for a small-dollar value would incentivize a consumer to seek redress.

Next, the proposed amendment addresses the concern that an attorney is unlikely to take low-value claims absent the class mechanism.⁵⁷ By including a provision that guarantees double attorney fees for a small claim in which the consumer receives an award more favorable than the company’s last written

⁵⁴ See Nancy Welsh, *Is the Supreme Court Demanding Enough As It Provides Incentives for the Private Funding of a Federal Small Claims Court?*, SCOTUSBLOG (Sept. 21, 2011, 2:13 PM), <http://www.scotusblog.com/2011/09/is-the-supreme-court-demanding-enough-as-it-provides-incentives-for-the-private-funding-of-a-federal-small-claims-court/>.

⁵⁵ As one commentator explained, social science research shows that people are not entirely rational decision makers, noting that people gamble in casinos. *Id.* Thus, an arbitration agreement with consumer-friendly provisions would encourage consumers to make claims, even when the claims are for small-dollar values.

⁵⁶ This provision would also protect businesses from the possibility of having to pay the costs of frivolous claims. If the arbitrator finds that either the substance of a consumer’s claim or the relief sought is frivolous or brought for an improper purpose, as measured by the standards set forth in the Federal Rules of Civil Procedure 11(b), then the payment of such fees will be governed by Section C-8 of the Supplementary Procedures.

⁵⁷ As Justice Breyer points out in his dissent, “[w]hat rational lawyer would . . . represent [a client] . . . for the possibility of fees stemming from a \$30.22 claim?” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011).

offer, the amendment provides incentive for attorneys to bring such claims.⁵⁸ While each individual recovery would not equate the enormous payoffs related to a successful class action claim, this provision would encourage a market for attorneys to bring relatively non-complex consumer claims. Moreover, by removing the confidentiality provision generally required in arbitration provisions, attorneys could advertise recoveries, informally aggregate claims, and disseminate information in the manner of their choosing to make arbitration more cost-effective.

Not only does this amendment lower the costs of arbitration for consumers and attorneys, but also this amendment provides consumers with the potential for substantial recovery. Similar to the significant “premium” offered by AT&T in *Concepcion*,⁵⁹ this amendment would provide the consumer a significant windfall if the consumer is awarded an amount in a low-value claim that is greater than the company’s last written settlement offer. If the consumer does recover more than the company’s last written settlement offer, in addition to having cost-free, expedient arbitration, the company would pay the consumer the greater of the amount of the award or an amount equal to the value of that maximum claim that may be brought in small claims court. Thus, even a consumer with a \$30 claim would have the potential to turn a meritorious low-value claim into a substantial recovery. Of course, the company could always choose to settle with the consumer, but even in that case, the consumer would be made whole before the formal arbitration process commenced.

⁵⁸In a case involving an arbitration agreement that contained a similar provision for attorneys’ fees, a number of attorneys testified that they would be willing to represent consumers invoking such arbitration procedures. See Brief of Appellant at 10–11, *Coneff v. AT&T Corp.*, No. 09-35563 (9th Cir. Nov. 10, 2009).

⁵⁹The arbitration agreement at issue in *Concepcion* contained a similar provision providing claimants with a significant windfall if they obtained an arbitration award greater than AT&T’s last settlement offer. 131 S. Ct. at 1753. As the majority in *Concepcion* noted, the District Court found that such a scheme would provide incentive for individual arbitration if the claims were not immediately settled. *Id.* In fact, the District Court found that the *Concepcions* “were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action . . .” *Id.*

B. *Deterring Business Misconduct*

In addition to incentivizing consumers to bring claims on an individual basis, this proposed amendment would also deter companies from future wrongdoing. In the aftermath of *Concepcion*, consumer advocates have attacked the Court's holding as providing businesses with immunity from accountability, even when a business has broken the law.⁶⁰ Recognizing that the class proceeding serves the important role of deterring business misconduct, the amendment includes provisions to adequately replace the deterrent effects of class actions.

First, the amendment would prompt companies to make favorable settlement offers, even to claims of low-dollar value, and would punish those companies who propose insufficient offers. Under the terms of the amendment, if the arbitrator awards the consumer more than the settlement value last offered by the company, then the company will pay the customer a significant sum. This would provide the company with a strong incentive to take consumer complaints seriously.

Moreover, the amendment creates a powerful deterrent against systematic wrongdoing by including a provision that does not require consumers or their attorneys to keep arbitration results confidential. Because the provision would enable consumers or attorneys to advertise or publicize their complaints, companies engaged in wrongful behavior would face the risk of serial claims. Likewise, given advances in technology and communication, it is likely that if a company engages in unfair business practices, disgruntled consumers will alert other consumers.⁶¹ Furthermore, given that the amendment offers consumers the option of proceeding in arbitration over the telephone, a company engaged in unfair business practices will face the threat of mass arbitrations by upset consumers, and the cost of providing arbitration for such a large number of consumers may cause the company to change its business practice.

Importantly, the amendment addresses the concern that the cost of pursuing a low-value claim would necessarily exceed any prospective recovery. Therefore, amending the Consumer Protocol provides the necessary protection to provide small-claim consumers with access to a forum to effectively vindicate their rights.

⁶⁰ See *Arbitration: Is it Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 10 (2011) (statement of F. Paul Bland, Senior Attorney, Public Justice).

⁶¹ In another case in which consumers alleged deceptive practices by a cell phone provider, after issuing a press release announcing the claim filed against the cell phone provider, 4,700 consumers with similar complaints contacted the Consumer Watchdog, a non-profit consumer advocacy organization. See Brief of Marygrace Coneff, et al. as Amici Curiae in Supporting Respondents at 10, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893).

V. CONCLUSION

As demonstrated by *AT&T Mobility v. Concepcion*, class arbitration waivers have the potential to significantly restrain the ability of consumers with small claims to hold businesses accountable for their misconduct. While *Concepcion* involved a decidedly “small” claim, its potential impact on consumers is substantial. To provide consumers with meaningful protection from business misconduct, efforts at arbitration reform should focus on enabling *all* consumers to vindicate their rights, including consumers with small claims. This Note has proposed one such solution. Amending the Consumer Protocol would provide businesses with a model for drafting arbitration agreements, guide courts in their decisions of whether to enforce particular arbitration agreements, and, significantly, ensure that consumers like the *Concepcions* are afforded access to justice.